

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1128

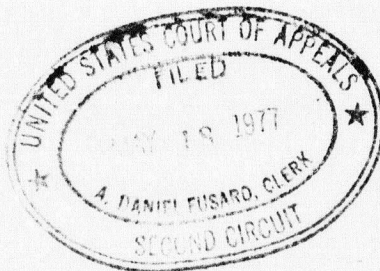
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :
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Plaintiff-Appellee, :
:
-against- :
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BERNARD MELTZER, :
:
Defendant-Appellant. :
:
-----x

Bp/s
Docket No. 77-1128

BRIEF FOR APPELLANT
PURSUANT TO
ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether the record of this case presents any non-frivolous
issues to be raised on appeal for review by this Court.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Henry Bramwell) rendered on March 11, 1977, after a jury trial, convicting appellant Bernard Meltzer of perjury, in violation of 18 U.S.C. §1623 (Count One), and sentencing him to three years' imprisonment. Execution of the sentence was suspended and appellant was placed on probation for three years.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Indictment*

On July 29, 1976, an indictment was filed charging that appellant had falsely testified as an alibi witness at the criminal trial of Joseph Setter, in violation of 18 U.S.C. §1623.

*A copy of the indictment is annexed as B to the separate appendix to appellant's brief.

B. The Trial

1. The Government's Case

Pursuant to a stipulation, a transcript of appellant's prior testimony given at the Setter trial was admitted into evidence. Counsel for the Government read portions of this transcript to the jurors. The minutes indicated that appellant had testified that during April, 1975, both he and Setter worked at Exclusive Motors in Brooklyn, New York (January 17, 1977, at 21*); that on April 17, 1975, Setter was at that place of business from 8:30 a.m. through 6:30 p.m.; that on that day Setter was there at 5:00 p.m. and 5:15 p.m.; and that appellant was positive of these facts (January 17, 1977, at 22-23). When asked whether Setter could have disappeared from Executive Motors between 4:00 p.m. and 6:00 p.m., appellant stated, "No way."

The following testimony from the Setter trial was then read:

Question: ... [C]ould [Mr. Setter] have been away for a half an hour during that period of time?

Answer: It was an impossibility during that period of time.

Question: You would have noticed it?

Answer: Yes.

*Numerals in parentheses preceded by a date refer to pages of the transcript of proceedings held on that date.

Question: You were in constant observation of him during that period of time?

Answer: Yes.

It was the Government's theory at appellant's trial that appellant knew that this testimony was false when given. To support this contention, New York City detective James Copeland testified that on April 17, 1975, at approximately 4:30 p.m., he and Harvey Rosenberg, a police informant, drove to Joseph Setter's residence on Glenwood Road in Brooklyn, New York (January 17, 1977, at 76). Rosenberg left the car and entered Setter's house. According to Copeland, Rosenberg returned to the car at 4:50 p.m. and was given \$4,800, with which he was to purchase cocaine. Rosenberg went back to Setter's residence and returned 15 minutes later with a bag containing cocaine (January 17, 1977, at 76-78; 81-82).

New York City police officer Michael Goulb confirmed portions of Officer Copeland's testimony, stating that on April 17, 1975, at 4:30 p.m. he saw Rosenberg enter Setter's residence, leave 20 minutes later, and return to the house a short time thereafter (January 18, 1977, at 4-6; 11-13).

Police officer John Ryan also testified as part of the Government's case. He stated that on April 17, 1975, he equipped the informant Rosenberg with a kel transmitter* (January 18, 1977, at 17). At approximately 4:30 p.m. on

*A kel transmitter, which is similar to a microphone, is an electronic device which allows the transmission and recording of a conversation.

that day, Officer Ryan saw Rosenberg leave the car in which he had been driven to the Setter residence. By use of the kel transmitter, Ryan was able to listen to the conversation occurring at that time between Rosenberg and another individual. Ryan testified that he recognized the other voice on the tape as Setter's. The tape and a transcript of the conversation were admitted into evidence without objection by trial counsel (January 18, 1977, at 19-20; 22-24).*

2. The Defense Case

Portions of appellant's testimony given at Joseph Setter's previous trial were also read to the jurors as part of the defense case. This portion of the transcript indicated that appellant remembered April 17, 1975, because of business records which showed that on that day at Exclusive Motors, Joseph Setter serviced a 1968 Mercedes Benz; that Setter had initialed certain of these records; and that the car was serviced "practically non-stop" for approximately two and one-half days (January 18, 1977, at 46-48; 50-54; 56; 59). The

*In addition, New York City detective Palmieri also testified. According to Palmieri, on February 20, 1976, he interviewed appellant at Exclusive Motors and questioned appellant about appellant's memory of April 17, 1975. Palmieri testified that in response to questioning, appellant stated that he remembered that day because of a "big job" on a Mercedes Benz; that Joseph Setter was at Exclusive Motors from the morning until approximately 7:00 p.m.; and that, while appellant did not see Setter the "whole time," appellant was certain that Setter was present "intermittently" the entire day (January 18, 1977, at 32-33; 36).

minutes read showed that appellant had previously testified that on April 17, 1975, at about 4:45 p.m., Setter prepared the payroll for the following day and that from 4:00 p.m. to 6:00 p.m., Setter was not out of appellant's sight for more than "two, three minutes" (January 18, 1977, at 54; 57).

After the reading of the transcript, appellant testified on his own behalf. He stated that he did not commit perjury at the Setter trial and that he first learned he was going to be called as an alibi witness the day before that trial (January 19, 1977, at 6; 19; 30). Further, appellant repeated that his prior testimony had been based on business records maintained by Exclusive Motors (January 19, 1977, at 29; 60). These records were entered into evidence (January 19, 1977, at 25).

On summation, the Assistant United States Attorney told the jurors that there were two principal issues for their determination: whether appellant's prior testimony was false and whether appellant knew it was false when he gave it (January 19, 1976, at 79; 81). Defense counsel argued that appellant had in fact been mistaken as to the whereabouts of Joseph Setter on April 17, 1975, but that appellant had made an honest mistake in good faith (January 19, 1977, at 115-116; 118-119).

3. The District Court's Charge*

The district court told the jurors that the Government had to prove the following essential elements of the crime charged:

First: That the testimony was given under oath, taken by the accused before a Court sitting in the Eastern District of New York, on the 27th day of May, 1976 as to a material matter before the Court;

Second: That the testimony so given was false in one or more of the respects charged;

Third: That the full testimony was willfully given and known by Mr. Meltzer to be false when given.

(January 19, 1977, at 143-144).

Moreover, the judge told the jurors that mere factual error did not constitute perjury, stating that the defendant "may have given incorrect testimony because of surprise, confusion, haste, inadvertence, honest mistake as to facts, carelessness or negligence" (January 19, 1977, at 145). Additionally, the jurors were instructed that they were the sole judges of the witnesses' credibility and the weight to be accorded to their testimony (January 19, 1977, at 151-155).**

*The complete text of Judge Bramwell's charge is reproduced as C to the separate appendix to appellant's brief.

**Trial counsel had no objections to the judge's charge.

After re-reading portions of the trial testimony and extensive deliberations, the jurors found appellant guilty as charged.

STATEMENT OF POSSIBLE LEGAL ISSUES

Appellant was charged with committing perjury at the trial of Joseph Setter by testifying that on April 17, 1975, between the hours of 4:00 and 6:00 p.m., Setter was on the premises of Exclusive Motors in Brooklyn, New York. It was the Government's theory at appellant's trial that appellant had lied about these circumstances and that Setter was not at that place of business between 4:30 and 5:05 p.m., but instead had sold drugs at that time to Harvey Rosenberg, a Government informant. In support of this theory, various police officers testified that they had seen Rosenberg enter Setter's residence and heard a conversation between Rosenberg and another person at that time. A tape and transcript of this conversation were entered into evidence. One of the police officers testified that he recognized the voice of the other person on the tape as Joseph Setter. Thus, the Government contended that appellant's prior testimony at the Setter trial was knowingly false when given.

On the other hand, the defense contended that, while appellant was mistaken as to the events of April 17, 1975, this

mistake was an honest one, made in good faith.

Thus, the issue presented at trial was a factual one to be determined by the jurors in light of the District Judge's instructions. The judge focused on the question by telling the jurors that in order to convict they were required to find that "the full testimony was willfully given and known by Mr. Meltzer to be false when given" (January 19, 1977, at 143-144). Consequently, in light of the proof at trial and the district court's instructions (see Appendix C), the jurors' adverse determination of the factual questions in the case cannot now be disturbed on appeal. United States v. Sisack, 527 F.2d 917, 921 (9th Cir. 1976); United States ex rel. Morton v. Mancusi, 393 F.2d 482 (2d Cir.), cert. denied, 393 U.S. 927 (1968); see generally United States v. Chapin, 515 F.2d 1294, 1280-1281 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975).

CONCLUSION

For the foregoing reasons, there are no non-frivolous issues to be raised for review by this Court; accordingly, the motion pursuant to Anders v. California, 386 U.S. 738 (1967), should be granted, and The Legal Aid Society, Federal Defender Services Unit, should be relieved as counsel for appellant Bernard Meltzer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

May 18 , 1977

I hereby certify that a copy of this brief [REDACTED]
[REDACTED] has been mailed to the United States Attorney
for the Eastern District of New York and to *appellant*.

Jonathan Silberman